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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD S. PAINTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

RICHARD E. WETZEL
LAW OFFICE OF
RICHARD E. WETZEL
1411 West Avenue
Suite 100
Austin, TX 78701
(512) 469-7943
(512) 474-5594 (fax)

Attorney for Petitioner
Richard S. Painter

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE COURT OF APPEALS ERRONEOUSLY PENALIZED PETITIONER FOR FAILING TO PROVE THE PREJUDICE COMPONENT OF HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM EVEN THOUGH HE HAS NEVER BEEN PROVIDED A FORUM IN WHICH TO PRESENT SUCH PROOF.

2. WHETHER THE COURT OF APPEALS ERRONEOUSLY FOUND PETITIONER FAILED TO DISCHARGE HIS BURDEN OF DEMONSTRATING PREJUDICE FROM THE DEFICIENT CONDUCT OF COUNSEL.

3. WHETHER THE COURT OF APPEALS ERRONEOUSLY FOUND PETITIONER WAS REQUIRED TO DEMONSTRATE PREJUDICE FROM COUNSEL'S DEFICIENT CONDUCT IN VIEW OF THE THREATENED VIOLATION OF THE RULE OF SPECIALTY MADE BY THE GOVERNMENT AT TRIAL.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Richard S. Painter respectfully petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence.

OPINION BELOW

The opinion of the Fifth Circuit affirming the denial of 28 U.S.C. § 2255 relief is not published. App. 1.

JURISDICTION

The Court of Appeals entered an order denying a motion for panel rehearing on August 22, 2007. App. 30. This petition is being filed within 90 days of that order. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

STATEMENT OF THE CASE

A. SUMMARY OF THE ISSUE

Petitioner seeks to have his federal drug conviction overturned on the basis his plea of guilty was involuntarily entered due to the ineffective assistance of counsel. Petitioner left the United States in an effort to avoid prosecution. Petitioner returned to the United States under a promise from our government to the country of Costa Rica concerning the offense for which petitioner could be punished. Despite that promise, the prosecutor at trial misrepresented the prosecutable offenses. Further, the promise of the United States to Costa Rica was not understood by the defense lawyer and resulted in him advising petitioner to plead guilty in an effort to avoid prosecution and a cumulative sentence for offenses which were not prosecutable under the Rule of Specialty. A plea of guilty entered pursuant to such erroneous advice is not voluntary and should be set aside. Although the Court of Appeals found deficient conduct by trial counsel, relief was not forthcoming upon a finding of no prejudice to petitioner. The instant petition presents a three-fold challenge to the finding of no prejudice. First, petitioner has never been provided a forum in which to present evidence of prejudice. Second, the record is sufficient to find prejudice. Third, in view of the threatened violation of the Rule of Specialty contained in the extradition treaty between the United States and Costa Rica, no prejudice need be shown.

B. STATEMENT OF FACTS

A law enforcement officer from the Corpus Christi, Texas, Police Department obtained a state search and arrest warrant for petitioner and his home in Corpus Christi. The warrant was executed the day it was obtained. Officers recovered various controlled substances, currency, weapons, jewelry, and a safe. Petitioner was arrested.

Petitioner was indicted in Nueces County, Texas, grand jury for possession of a controlled substance. The state charge was eventually dismissed because the charge was adopted for federal prosecution.

Petitioner was indicted by a federal grand jury. The indictment alleged two instances of possession of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841(a)(1). The first count alleged possession with intent to distribute approximately 85 grams of methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). The second count alleged possession with intent to distribute approximately 42 grams of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C).

Petitioner was released on bond and then failed to appear for re-arraignment in the drug prosecution. He likewise failed to appear for final pretrial conference in the drug prosecution. Petitioner was subsequently indicted by a federal grand jury for two instances of failure to appear in violation of 18 U.S.C. § 3146(a)(1). The indictment contained two counts

charging petitioner with failing to appear for re-arraignment and final pretrial conference.

Petitioner was apprehended in the country of Costa Rica on a federal warrant. United States authorities sought extradition on both indictments pending against petitioner. On July 26, 2002, the Costa Rican government authorized petitioner's return to the United States dependent upon the promise petitioner would not be judged for acts different from those in the extradition request and no punishment would be sought different from that authorized by 21 U.S.C. § 841(a)(1). No extradition was authorized by the Costa Rican government for which punishment could be sought under 18 U.S.C. § 3146(a)(1), the failure to appear indictment.

The United States Embassy provided assurance the Rule of Specialty contained within Article 16 of the extradition treaty between the United States and Costa Rica would be observed and petitioner would not be detained, tried, or punished for offenses other than those for which extradition had been granted. Petitioner was extradited to the United States from Costa Rica.

Following his return to the United States, counsel was appointed to represent petitioner on the pending failure to appear indictment. The same counsel was appointed as co-counsel on the pending drug indictment.

On February 20, 2003, petitioner appeared for the final pretrial conference in the failure to appear

charge. At that time, the government announced that upon the petitioner's plea or a jury verdict in the pending drug case, the failure to appear indictment would be dismissed. Immediately thereafter, petitioner entered a plea of guilty to both counts of the pending drug indictment. There was no plea agreement.

The Presentence Report recommended an adjustment for obstruction of justice based on petitioner's failure to appear on the drug charge and flight to the country of Costa Rica. The report further recommended no adjustment for acceptance of responsibility based on the adjustment for obstruction of justice. Trial counsel for petitioner presented no challenge to the denial of an adjustment for acceptance of responsibility on the basis such denial violated the Rule of Specialty contained within the extradition treaty between Costa Rica and the United States. Likewise, no challenge to the adjustment for obstruction of justice was voiced on the basis it violated the Rule of Specialty. Counsel conceded an adjustment for obstruction of justice was appropriate when arguing an upward departure was not warranted.

During sentencing proceedings, the District Court indicated it was not inclined to make an adjustment for acceptance of responsibility due to petitioner's flight to Costa Rica. The prosecutor stated the United States had obtained extradition on both of the pending indictments. The prosecutor further observed petitioner was receiving a two point

adjustment for obstruction of justice which he considered a successful prosecution for the failure to appear charge despite the dismissal of the failure to appear indictment.

Counsel for petitioner stated during the sentencing proceeding there had been some discussion about whether petitioner could be prosecuted in the United States for failure to appear since the extradition was based on the drug charge, however, counsel conceded: "I don't know." Counsel further stated: "I think that this Rule of Specialty is what was involved. And they obviously lost because he was brought over and successfully prosecuted for both charges." At that point, the District Court reminded counsel for petitioner the failure to appear charge was to be dismissed.

The applicable range of imprisonment under the guidelines for an offense level of 30 and criminal history category one was 97 to 121 months. The prosecutor recommended 108 months. The defense sought a term of imprisonment of 97 months. The Court imposed a term of imprisonment of 115 months on each count to run concurrently. The Court made it clear that its decision was based in part on the petitioner's conduct before the Court in fleeing to Costa Rica. Ultimately, the indictment in the failure to appear prosecution was dismissed the same day as sentencing in the drug prosecution.

C. PROCEDURAL HISTORY

Petitioner was indicted in a two count indictment returned by a federal grand jury. Both counts alleged drug offenses under 21 U.S.C. § 841(a)(1). Petitioner entered pleas of guilty to both counts of the indictment. He was sentenced to 115 months on each count of the indictment with the sentences to be served concurrently; five years of supervised release as to count one and three years of supervised release as to count two to run concurrently; $100.00 special assessment as to each count to run consecutively; and a $500.00 fine as to each count to run concurrently. No notice of appeal was given.

Petitioner timely filed in the District Court his Motion by a Person in Federal Custody to Vacate, Set Aside, or Correct the Sentence Under 28 U.S.C. § 2255. The motion contained four grounds for relief. Petitioner specifically complained he could not have been prosecuted on the failure to appear charge due to the Costa Rican directive that no punishment other than that authorized by 21 U.S.C. § 841(a)(1) could be imposed upon petitioner's return to the United States.

Respondent filed a response to the § 2255 motion and motion for summary judgment. Within that response, respondent asserted Costa Rica authorized extradition on the failure to appear charge and the Rule of Specialty would not have prohibited prosecution on that charge. Respondent relied on the statements made by the prosecutor at sentencing that

Costa Rica had authorized extradition on both indictments. The District Court denied the § 2255 motion in a written order. App. 9-25. The District Court denied petitioner a Certificate of Appealability (COA). App. 27.

Notice of appeal to the United States Court of Appeals was timely filed by petitioner. While the appeal was pending, petitioner acquired a translation of a Costa Rican court document from respondent and filed his motion for relief from final judgment under Fed. R. Civ. P. 60(b)(3). Petitioner urged the translation supported his claim the failure to appear charge was not a viable prosecutable charge and contradicted the respondent's previous assertions that Costa Rica authorized extradition on the failure to appear charge and the Rule of Specialty would not have prohibited prosecution on that charge. The motion further urged the translation contradicted the statements made by the prosecutor at sentencing to the effect that Costa Rica had authorized extradition on both indictments. Finally, the motion urged the Court's previous rejection of defendant's ineffective assistance of counsel and involuntary plea claims had been undermined by the recently acquired translation from the respondent. The District Court denied petitioner's motion for relief under Fed. R. Civ. P. 60(b)(3).

The Court of Appeals partially granted petitioner's motion for a COA. App. 28-29. Ultimately, the Court of Appeals issued an unpublished opinion affirming the District Court's denial of the 28 U.S.C.

§ 2255 motion to vacate, set aside, or correct petitioner's sentence. App. 1-8. A petition for panel rehearing was denied. App. 30-31.

REASONS FOR GRANTING THE PETITION

The District Court denied the § 2255 motion without holding an evidentiary hearing allowing petitioner an opportunity to prove his claims. App. 9-10. The Circuit Court affirmed the denial of relief after finding petitioner failed to demonstrate prejudice as a result of counsel's deficient conduct. App. 8.

Under the Antiterrorism and Effective Death Penalty Act of 1996, a Circuit Court's review is limited to the issues enumerated in the COA. 28 U.S.C. § 2253(c)(1). In reviewing a district court's denial of a motion to vacate a sentence under § 2255, the court will review questions of fact for clear error and questions of law de novo. *United States v. Chaves*, 193 F.3d 375, 378 (5th Cir. 1999). Claims of ineffective assistance of counsel are reviewed de novo. *United States v. Molina-Uribe*, 429 F.3d 514, 518 (5th Cir. 2005).

An abuse of discretion standard is applicable to a district court's decision to deny an evidentiary hearing on a § 2255 motion. *Schiro v. Landrigan*, ___ U.S. ___, 127 S.Ct. 1933, 1939-40 (2007). The Circuit Court will find an abuse of discretion and direct a district court to hold an evidentiary hearing if the defendant produces independent indicia of the likely merit of his

allegations. *United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998).

Upon filing his § 2255 motion, petitioner prayed for specific and general relief in the District Court. He filed extradition documents supporting his claims and swore to the allegations of the motion. No relief was forthcoming and the motion was denied without an evidentiary hearing. During argument before the Court of Appeals, counsel requested a remand to the District Court for a hearing in the event the Court found the record inadequately developed.

Upon affirming the denial of relief, the Circuit Court faulted petitioner for failing to discharge his burden of proof on the issue of prejudice. Petitioner maintains it is unfair to penalize him for failing to carry his burden of proof when he has never been provided a forum in which to discharge that burden. Rather than affirm the denial of relief due to an absence of proof, the Court of Appeals should have remanded the cause to the district court for an evidentiary hearing in order to allow petitioner an opportunity to further develop the record and demonstrate prejudice under the applicable standards in *Strickland v. Washington*, 466 U.S. 668, 687 (1984) and *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Contrary to *Schiro v. Landrigan*, ___ U.S. ___, 127 S.Ct. 1933, 1939-40 (2007), the Court of Appeals erroneously found no need to remand the matter to the District Court for an evidentiary hearing.

The § 2255 motion presented a voluntariness of the plea complaint predicated on a claim of ineffective assistance of counsel. The District Court rejected petitioner's involuntary guilty plea complaint on the basis it was procedurally defaulted by petitioner's failure to appeal. However, in *Massaro v. United States*, 538 U.S. 500, 504 (2003) it was recognized claims of ineffective counsel are not subject to procedural default and may be raised for the first time in an action under § 2255.

Petitioner had a right to the effective assistance of counsel at trial. U.S. CONST. amend. VI; *Powell v. Alabama*, 287 U.S. 45 (1932). Counsel must act within the range of competence demanded of counsel in criminal cases. *McMann v. Richardson*, 397 U.S. 759 (1970).

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Court established the federal constitutional standard for determining whether counsel rendered reasonably effective assistance. A defendant first must show that counsel's performance was deficient; that counsel made errors so serious that he was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, a defendant must show that the deficient performance prejudiced the defense; that counsel's errors were so serious as to deprive the defendant of a fair trial with a reliable result.

A defendant must identify specific acts or omissions of counsel that are alleged not to have been the

result of reasonable professional judgment. The reviewing court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance. Ultimately, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. 694.

The *Strickland* standard applies to a challenge to a guilty plea based on ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52 (1985). The defendant must show that counsel's advice was deficient and, but for that advice, there is a reasonable probability that he would have pled not guilty and gone to trial. *Hill*, 474 U.S. at 59.

In the instant cause, trial counsel advised petitioner the failure to appear charge was viable and that any sentence received on the charge following a plea or jury verdict would be served consecutively to any sentence received in the outstanding drug case. Counsel misadvised petitioner on the viability of the pending failure to appear charge in view of the extradition authorized by the Costa Rican government for petitioner's return to the United States.

Under the Rule of Specialty as contained within the extradition treaty, petitioner could not have been prosecuted on the pending failure to appear charge due to the Costa Rican directive that no punishment

other than that authorized by 21 U.S.C. § 848(a)(1) could be imposed and the United States assurance to observe the Rule of Specialty. The misinformation provided by counsel motivated petitioner to enter a plea of guilty to the pending drug indictment in an effort to avoid trial and a consecutive sentence if he was eventually tried and convicted on the pending failure to appear charge.

Counsel provided erroneous information to petitioner concerning the pending failure to appear charge. That information prompted petitioner to enter a plea of guilty to the pending drug charge with no plea bargain or concession from the government with regard to sentencing. But for counsel's erroneous advice, petitioner would have pled not guilty and gone to trial in the pending drug prosecution.

In finding a lack of prejudice, the Court of Appeals focused on the government's statement at the time of the plea that it would dismiss the failure to appear charges if petitioner either plead guilty to or was convicted of the drug charges. App. 7. The Court found the statement undermined petitioner's claim of prejudice from counsel's deficient conduct.

Petitioner respectfully disagrees. The record is sufficient to show prejudice from counsel's deficient performance. Counsel engaged in an act of deficient performance by failing to appreciate the scope of viable charges pending against his client. Petitioner has consistently maintained that had he understood the failure to appear charge was not viable, he would

have entered a plea of not guilty to the drug offense. The government's offer to dismiss a charge it could not prosecute and the District Court's threat that it might not grant the motion to dismiss and that the charges could later be refiled do not undermine the assertion of prejudice suffered by petitioner. Those offers by the government and threats by the District Court are meaningless in view of the limitation of prosecution which could be brought under the Rule of Specialty. Such evidence actually supports the showing of prejudice and the Court of Appeals erroneously found to the contrary. Misapplication of the prejudice standard of *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) warrants the granting of the instant petition.

Finally, petitioner maintains prejudice was established as a matter of law. The confluence of the misrepresentations by respondent at trial and the deficient performance by trial counsel establish prejudice resulting in the guilty plea being involuntary.

Under the Rule or Doctrine of Specialty, a requisitioning state or country may not, without the permission of the asylum state or country, detain, try, or punish the fugitive for any crimes committed before the extradition except the crimes for which he was extradited. *United States v. Alvarez-Machain*, 504 U.S. 655, 659 (1992); *United States v. Rauscher*, 119 U.S. 407, 430 (1886). The extradition treaty between the United States and Costa Rica expressly includes the doctrine:

> "Article 16 Rule of Specialty: (1) A person extradited under this Treaty may be detained, tried or punished in the Requesting state only for: (a) The offense for which extradition has been granted; (b) a lesser included offense; (c) an offense committed after the extradition; or (d) any offense for which the Requested State consents to the person's detention, trial, or punishment." Extradition Treaty, United States – Costa Rica, art. 16, Dec. 4, 1982, S. Treaty Doc. No. 98-17.

It should be remembered that under the terms of the extradition treaty between the United States and Costa Rica, if the United States is the requesting state, all documents shall be translated into the language of Costa Rica. Extradition Treaty, United States – Costa Rica, art. 9 ¶ 6, Dec. 4, 1982, S. Treaty Doc. No. 98-17. In view of the treaty requirement, there should be little question but that respondent was on notice of the limitation imposed by the Costa Rican government on petitioner's extradition to the United States.

An alleged treaty violation is cognizable in a § 2255 action. *Davis v. United States*, 417 U.S. 333, 344-45 (1974). Indeed, as long ago as *Mali v. Keeper of the Common Jail*, 120 U.S. 1, 17 (1887), the Court recognized treaty rights may be enforced by a writ of habeas corpus.

In the case at hand, the government misrepresented to defense counsel and the District Court the extent of viable charges which could be prosecuted

against petitioner. On the basis of those misrepresentations and trial counsel's ineptitude, petitioner entered a plea of guilty in order to avoid a non-prosecutable offense. The false assertions before the District Court at the time of trial should suffice to establish prejudice and petitioner should not be required to prove more. Prejudice has been shown as a matter of law. When coupled with the finding of deficient conduct, petitioner should be granted relief from his involuntary plea of guilty.

CONCLUSION

Petitioner requests that this Court grant the petition for a writ of certiorari, reverse the judgment of the Court of Appeals and remand to the Court of Appeals for further consideration of petitioner's claim his plea of guilty was involuntary due to ineffective assistance of counsel.

Respectfully submitted,

RICHARD E. WETZEL
LAW OFFICE OF
RICHARD E. WETZEL
1411 West Avenue
Suite 100
Austin, TX 78701
(512) 469-7943
(512) 474-5594 (fax)

Attorney for Petitioner
Richard S. Painter

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 05-40039

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD S PAINTER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
2:01-CR-00190

(Filed Jun. 26, 2007)

Before HIGGINBOTHAM, WIENER, and CLEMENT, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:*

Richard Painter pleaded guilty to one count of possession with intent to distribute approximately 85 grams of methamphetamine and one count of

* Pursuant to 5th Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

possession with intent to distribute approximately 42 grams of cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(B), and (b)(1)(C). Painter received a sentence of 115 months and did not file a direct appeal. Painter then moved, under 28 U.S.C. § 2255, to vacate, set aside, or correct his sentence. The district court denied this motion and declined to issue a certificate of appealability ("COA"). Painter timely appealed. The Fifth Circuit issued a COA on two issues: "(1) whether counsel's erroneous advice regarding offenses for which Painter could have been prosecuted following extradition rendered his guilty plea involuntary, and (2) whether the procedural default doctrine applies to claims based on the rule of specialty or whether such claims may be raised for the first time in § 2255 motion." The court also stated: "In addition, the parties are directed to brief whether Painter has standing to assert claims based on the rule of specialty." We affirm.

I. FACTS AND PROCEEDINGS

On July 6, 1999, Corpus Christi police officers arrested Painter and searched his home pursuant to a warrant. They found marijuana, LSD, methamphetamine, cocaine, Rohypnol, currency, and several guns. On June 14, 2001, the government charged Painter with possession with intent to distribute methamphetamine and possession with intent to distribute cocaine. Painter was released on bond on June 18, 2001.

Painter failed to appear for his July 30, 2001 rearraignment and his July 31, 2001 final pre-trial conference. On December 12, 2001, the government charged him with two counts of failure to appear. At some point during these events, Painter absconded to Costa Rica where he was arrested on April 4, 2002. The United States government sought extradition based on both the drug possession and failure to appear charges. Painter fought the extradition, but Costa Rica extradited him pursuant to a Spanish-language extradition order, issued by a court, which stated, unbeknownst to the parties at the time because the document was untranslated, that:

> The delivery of the individual requested is subject to the existence of a formal pledge, on the part of the authorities of the United States Government, that Richard Stuart Painter will not be tried for acts different from those that prompted the extradition and that they will not apply penalties different from those indicated in Title 21, Article 841(a)(1) of the Code of the United States of America.

On February 20, 2003, Painter appeared for a pre-trial conference on the failure to appear charges. The government announced that, upon Painter's guilty plea or guilty verdict in the pending drug case, it would move to dismiss the failure to appear indictment. That same day, Painter pleaded guilty to both counts of the drug possession indictment. Later, the district court dismissed the failure to appear indictment on the government's motion.

The pre-sentence report ("PSR") recommended upward adjustment for obstruction of justice and denial of acceptance of responsibility, based on Painter's failure to appear and flight to Costa Rica. Painter, through appointed counsel, filed objections to the PSR, but he did not challenge either recommendation on the ground that it violated the Rule of Specialty – a provision in the extradition treaty between the United States and Costa Rica, common to such treaties, allowing a country to extradite only for specified crimes. Painter never raised a direct Rule of Specialty objection, but he argued for acceptance of responsibility and against the government's suggestion of an upward departure based on inadequacy of criminal history. The court adopted the PSR in its entirety, rejecting an upward departure. The applicable range was 97 to 121 months. The government recommended 108 months, Painter sought 97 months, and the court sentenced him to 115 months on each count, to run concurrently, citing his flight and disrespect for the court.

Painter did not file a direct appeal. He moved, under 28 U.S.C. § 2255, to vacate, set aside, or correct his sentence. Painter raised four issues: (1) that the denial of acceptance of responsibility violated the Rule of Specialty because it was based on the failure to appear offense; (2) that the upward adjustment for obstruction violated the Rule of Specialty for the same reason; (3) that he was denied effective assistance of counsel by his counsel's failure to raise the first two grounds; and (4) that his plea was

unknowing and involuntary because he pleaded guilty to avoid prosecution for failure to appear, he could not be charged with failure to appear given the Rule of Specialty, and his counsel was ineffective in not advising him as such. The district court denied the motion and declined to issue a COA. Painter timely appealed and also filed a motion, under FED.R.CIV.P. 60(B), seeking relief from the judgment, which the district court denied.

Painter sought a COA from this court. This court granted the COA, in part, regarding: "(1) whether counsel's erroneous advice regarding offenses for which Painter could have been prosecuted following extradition rendered his guilty plea involuntary, and (2) whether the procedural default doctrine applies to claims based on the rule of specialty or whether such claims may be raised for the first time in a § 2255 motion." The court also stated: "In addition, the parties are directed to brief whether Painter has standing to assert claims based on the rule of specialty." In his brief, Painter concedes all claims except for ineffective assistance of counsel. We therefore address only this claim.

II. STANDARD OF REVIEW

In evaluating the district court's denial of a 28 U.S.C. § 2255 motion, we review findings of fact for clear error and questions of law de novo. *United States v. Scott,* 987 F.2d 261, 264 (5th Cir. 1993). The district court's conclusion on an ineffective assistance

of counsel claim constitutes a mixed question of law and fact, which we review de novo. *United States v. Bass,* 310 F.3d 321, 325 (5th Cir. 2002).

III. DISCUSSION

On appeal, Painter argues that his guilty plea was involuntary because it was predicated on advice from his trial counsel that he could be prosecuted for failure to appear if he did not plead guilty to the drug charges. Painter alleges that his trial counsel told him that the failure to appear indictment was still viable and that, if he were convicted of both the drug charges and the failure to appear charges, his sentences for drug possession and failure to appear would be consecutive.

Imbedded in this ineffective assistance of counsel claim is the assertion that an individual defendant can properly invoke the Rule of Specialty contained in an extradition treaty between the United States and another nation. This issue remains unsettled. *See United States v. LeBarron,* 156 F.3d 621, 627 (5th Cir. 1998). We need not resolve it here, however, as we determine that Painter's ineffective assistance of counsel claim lacks merit for an independent reason. In addition, we note that the issue of whether Painter could invoke the Rule of Specialty, which we do not resolve, is distinct from that of Painter's standing to file a § 2255 motion, which we must. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 93-101 (1998).

We hold that Painter has standing to file this § 2255 motion.

In order to succeed on his ineffective assistance of counsel claim, Painter must demonstrate that: (1) his trial counsel was deficient and (2) the deficiency was prejudicial. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). Deficient performance means "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Prejudice means that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Evaluating prejudice in the context of an allegedly involuntary guilty plea involves asking "whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words . . . the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart,* 474 U.S. 52, 59 (1985).

Painter does not dispute that the government agreed to dismiss the failure to appear charges if he either pleaded guilty to or was convicted of the drug charges. Instead, he notes that the district court expressed uncertainty regarding whether it would grant the motion to dismiss the failure to appear charges and that these charges could potentially be refiled later. Painter asserts that, as a result of this situation, the offer to dismiss the failure to appear charges was a "hollow" offer.

Having considered the parties' arguments, we conclude that there is not "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* Accordingly, Painter has failed to satisfy the second requirement for an ineffective assistance of counsel claim.

IV. CONCLUSION

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff-Respondent,	§	Cr. No. C-01-190
v.	§	C.A. No. C-04-309
RICHARD S. PAINTER,	§	
Defendant-Movant.	§	

ORDER DENYING MOTION TO VACATE SENTENCE UNDER 28 U.S.C. § 2255, AND ORDER DENYING CERTIFICATE OF APPEALABILITY

On June 4, 2004, Defendant/Movant Richard S. Painter, through counsel, filed a motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. (D.E. 47).[1] On June 13, 2004, the Court ordered that the motion be stricken because the exhibits were not tabbed and thus it failed to comply with this Court's standing order. (D.E. 48). On June 28, 2004, Painter filed another § 2255 motion (D.E. 50) which appears to be identical with the exception of the exhibits being tabbed. This motion is now pending before the Court. The government has filed a response, and has moved for dismissal or, in the alternative, summary

[1] Docket entries refer to the criminal case, CR. No. C-01-190.

judgment against Painter's motion. (D.E. 56). Painter filed a reply and response to the summary judgment motion (D.E. 58), which the Court has also considered. For the reasons set forth herein, the Court DENIES Painter's § 2255 motion (D.E. 50) and DENIES him a Certificate of Appealability.

I. JURISDICTION

The Court has jurisdiction over this matter under 28 U.S.C. § 2255.

II. FACTUAL AND PROCEDURAL BACKGROUND[2]

On July 6, 1999, a law enforcement officer from the Corpus Christi Police Department obtained a state search and arrest warrant for Painter and for his home. The warrant was executed the same day, and Painter was arrested at his home. Officers recovered various controlled substances, including loose marijuana, LSD, methamphetamine, cocaine, Rohypnol, and prescription drugs (such as Valium), as well as currency and weapons. Some of the contraband was located in a safe which the occupants of the home (*i.e.*, Painter and Fayne Parker) refused to open during the search. Officers were able to recover items

[2] Information concerning the offense conduct is taken from the Presentence Investigation Report ("PSR") at ¶¶ 4-7, unless otherwise noted.

from the safe the following day, after it was opened with the assistance of a locksmith.

Painter was originally indicted by a Nueces County grand jury, but the state charge was dismissed on January 19, 2001, because the case was adopted for federal prosecution. On June 14, 2001, Painter was charged in a two-count federal indictment. Count one alleged that he knowingly and intentionally possessed with intent to distribute more than fifty (50) grams (specifically, approximately eighty-five (85) grams) of a mixture or substance containing methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(D). Count two alleged that he knowingly and intentionally possessed with intent to distribute less than five hundred (500) grams of cocaine (specifically, approximately forty-two (42) grams of cocaine), in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C).

Painter was released on bond on June 18, 2001. On July 30, 2001, he failed to appear for rearrangement and, on July 31, 2001, he failed to appear for his final pre-trial conference. On December 12, 2001, a federal grand jury charged Painter in a two-count indictment in Cause No. 2:01cr387 with two counts of failure to appear in violation of 18 U.S.C. § 3146(a)(1). (No. 2:01cr387, D.E. 1).

On April 4, 2002, Painter was apprehended in the country of Costa Rica. United States authorities sought extradition on both indictments pending against Painter. On July 26, 2002, the Costa Rican

government authorized Painter's return to the United States. Painter asserts that the return was dependent upon the promise that Painter would not be judged for acts different from those in the extradition request and that no punishment would be sought different from that authorized by 21 U.S.C. § 841(a)(1). Specifically, he argues that no extradition was authorized by the Costa Rican government for the charges in the failure to appear indictment.

On February 20, 2003, Painter appeared for the pretrial conference in the failure to appear charge. (No. 2:01cr387, D.E. 17). The government announced that upon Painter's plea or a jury verdict in the pending drug case, the failure to appear indictment would be dismissed. (*Id.*). That same day, Painter pleaded guilty to both counts of the pending drug indictment. (D.E. 31). The Court then granted the government's motion to dismiss the indictment in the failure to appear case. (No. 2:01cr387. D.E. 18, 19)

Pursuant to the Court's instructions (D.E. 32), the probation department prepared a PSR. The PSR recommended an upward adjustment for obstruction of justice based on Painter's failure to appear and flight to Costa Rica, and further recommended no adjustment for acceptance of responsibility. (*See* PSR at ¶¶ 9-11, 18, 20). Painter, through appointed counsel, filed objections to the PSR. Counsel did not challenge (as Painter now asserts he should have) either the denial of an adjustment for acceptance of responsibility or the obstruction of justice adjustment on the grounds that both violated the Rule of

Specialty contained within the extradition treaty between Costa Rica and the United States. The Rule of Specialty is a general principle that is codified in many extradition treaties. In general terms, it provides that an extradited person must be tried or punished only for the offense for which extradition was granted. The principle is set forth in Article 16 of the United States Extradition Treaty with Costa Rica. (*See* D.E. 56 at 13 & n.6 (citing full text of Rule of Specialty in this particular treaty)).

There was a brief discussion at sentencing regarding the Rule of Specialty. In its entirety, that discussion was as follows:

> MR. GONZALEZ-FALLA [Painter's counsel]: I think the legal wrangling [in Costa Rica] had to do with what he would be prosecuted for in the United States if he were to appeal the decision – some additional charges or not. I think that's what the fighting was about. I think he was charged with drugs and then he fled and then he was later indicted for the failure to appear, and there may have been some discussion about whether he could be prosecuted here for the failure to appear since the extradition is based on the drugs – I don't know. I think that's what the lawyers were doing there.
>
> THE COURT: I'm not familiar with extradition laws but that doesn't make a whole lot of sense.

MR. MUSCHENHEIM (Assistant U.S. Attorney): The United States had extradition for both indictments. Under the Rule of Specialty we could only prosecute for those two indictments.

MR. GONZALEZ-FALLA: I think that this Rule of Specialty is what was involved. And they obviously lost because he was brought over and successfully prosecuted for both charges.

THE COURT: Actually one – one has been dismissed.

MR. GONZALEZ-FALLA: For one, that's correct. But he was indicted –

THE COURT: So he's [sic] has not been successfully prosecuted for one.

MR GONZALEZ-FALLA: But we haven't –

MR. MUSCHENHEIM: I would consider it a successful prosecution.

THE COURT: Well, not if it's dismissed. How is that successful?

MR. MUSCHENHEIM: Well he's received two points for obstruction, your Honor.

THE COURT: Well that was going to happen whether or not you prosecuted him for obstruction or for failure to appear.

MR. MUSCHENHEIM: Yes, your Honor. But with respect to the guideline calculations, I don't believe you could both give two

> points for obstruction and then stack a sentence for failure to appear on it. So I don't think it's a large difference in the sentencing range.

S. Tr. at 11-12.

Although his counsel did not raise a Rule of Specialty objection, he strenuously argued that Painter should be given a adjustment in his offense level for acceptance of responsibility. (D.E. 42, Sentencing Transcript "S. Tr." at 7-16). After hearing from Painter's counsel, the Court overruled Painter's objection to the denial of credit for acceptance of responsibility. He also argued against an upward departure, which the United States suggested would be appropriate based on the inadequacy of Painter's criminal history category under U.S.S.G. § 4A1.3. The Court adopted the PSR in its entirety, but did not upwardly depart from the Guidelines.

The applicable range of imprisonment under the guidelines for an offense level of 30 and a criminal history category I was 97 to 121 months. (PSR at ¶ 44). The United States recommended 108 months, and the defendant sought a term of imprisonment of 97 months. (S. Tr. at 25-26). The Court imposed a term of imprisonment of 115 months on each count to run concurrently, to be followed by a five-year term of supervised release on Count One, and a three-year term of supervised release on Count Two, to run concurrent, a $500 fine on each count, and a special

assessment of $100 on each count. (S. Tr. at 26-27; D.E. 41).

Judgment of conviction was entered May 28, 2003. (D.E. 41). Painter did not appeal. Instead, Painter filed a timely § 2255 motion on June 4, 2004. (D.E. 47). As previously noted, on June 15, 2004, the Court entered an order striking his motion because his exhibits were not tabbed and thus it failed to comply with this Court's standing order. (D.E. 48). On June 28, 2004, Painter filed another § 2255 motion (D.E. 50) which appears to be identical with the exception of the exhibits being tabbed. This motion is now pending before the Court. The government does not challenge the timeliness of the motion (D.E. 56 at 3 & n.2),[3] and the Court deems it timely filed.

III. MOVANT'S ALLEGATIONS

In his motion, Painter asserts the following grounds for relief:

1. The Court's denial of a downward adjustment for acceptance of responsibility violated the Rule of Specialty, because it was based on the failure to appear offense;

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[3] The government correctly notes that, although the second motion was filed after the deadline for filing a § 2255 motion, it is identical in content to the timely-filed first motion, which was stricken for tacking exhibit tabs. Thus, the second relates back to the first for limitations purposes.

2. The Court's imposition of an upward adjustment in Painter's offense level for obstruction of justice violated the Rule of Specialty;

3. Painter was denied effective assistance of counsel due to his counsel's failure to object to the alleged errors outlined in the first two grounds above, or to raise them on appeal;

4. Painter's plea of guilty was involuntarily and unknowing because he pleaded guilty to avoid prosecution for the failure to appear offense, and that offense could not be prosecuted without violating the Rule of Specialty; and

5. Painter was denied effective assistance of counsel because his counsel did not advise Painter that he could not be prosecuted for the failure to appear, and thereby induced Painter's unknowing and involuntary plea.

As discussed in detail herein, Painter is not entitled to relief.

IV. DISCUSSION

A. 28 U.S.C. § 2255

There are four cognizable grounds upon which a federal prisoner may move to vacate, set aside or correct his sentence: (1) constitutional issues, (2) challenges to the district court's jurisdiction to impose the sentence, (3) challenges to the length of a sentence in excess of the statutory maximum, and (4) claims that the sentence is otherwise subject to

collateral attack. 28 U.S.C. § 2255; *United States v. Placente,* 81 F.3d 555, 558 (5th Cir 1996). "Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Vaughn,* 955 F.2d 367, 368 (5th Cir. 1992). "[A] collateral challenge may not do service for an appeal." *United States v. Frady,* 456 U.S. 152, 165, 102 S. Ct. 1584, 1593 (1982).

B. Grounds One, Two, and Four Are Procedurally Barred

To the extent that Painter argues that the Court's decisions on acceptance of responsibility and obstruction of justice violated the Rule of Specialty, those claims are not properly before the Court for one simple reason: they are claims that Painter should have raised on appeal and he did not. Likewise, his claim that his guilty plea was unknowing and involuntary should have been raised on appeal. Because he failed to do pursue those grounds on appeal, they are procedurally barred from consideration here. *See United States v. Lopez,* 248 F.3d 427, 433 (5th Cir.

2001); *United States v. Kallestad,* 236 F.3d 225, 227 (5th Cir. 2000).[4]

A district court may consider a defaulted claim only if the petitioner can demonstrate either (1) cause for his default and actual prejudice or (2) that he is factually innocent of the crime charged. *Bousley v. United States,* 523 U.S. 614, 622, 118 S. Ct. 1604, 1611 (1998); *United States v. Jones,* 172 F.3d 381, 384 (5th Cir. 1999). Painter makes no argument that he is actually innocent. Further, he offers no explanation as to why he failed to raise these issues on appeal, other than to argue that his attorney was deficient for failing to raise them. (D.E. 58 at p. 3-4). More importantly, he cannot establish the prejudice necessary to overcome his default for the reasons discussed *infra* at Section C. Thus, his first, second, and fourth grounds for relief fail because they are procedurally barred. Even if properly before the Court, these claims – and his ineffective assistance claims – fail on their merits. As discussed in detail in the next section, Painter is incorrect in his assertion that the rulings of this Court at sentencing violated the Rule of Specialty. All of his claims are premised on this incorrect assertion and fail accordingly.

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[4] To the extent Painter is arguing that treaty violations are exempt from the general rule stated in *Lopez* and *Kallestad,* he is incorrect, as discussed infra at pages 8-9.

C. Ineffective Assistance of Counsel

Painter's ineffective assistance claims are properly analyzed under the two-prong analysis set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984). *United States v. Willis,* 273 F.3d 592, 598 (5th Cir. 2001). To prevail on a claim of ineffective assistance of counsel, a movant must demonstrate that his counsel's performance was both deficient and prejudicial. *Id.* This means that a movant must show that counsel's performance was outside the broad range of what is considered reasonable assistance and that this deficient performance led to an unfair and unreliable conviction and sentence. *U.S. v. Dovalina,* 262 F.3d 472, 474-75 (5th Cir. 2001).

If the movant fails to prove one prong, it is not necessary to analyze the other. *Armstead v. Scott,* 37 F.3d 202, 210 (5th Cir. 1994) ("A court need not address both components of the inquiry if the defendant makes an insufficient showing on one"), *cert. denied,* 514 U.S. 1071, 115 S. Ct. 1709 (1995); *Carter v. Johnson,* 131 F.3d 452, 463 (5th Cir. 1997) ("Failure to prove either deficient performance or actual prejudice is fatal to an ineffective assistance claim.").

It is unnecessary for the Court to determine whether Painter's counsel was deficient for failing to object to either the denial of acceptance of responsibility or the obstruction of justice enhancement. Painter's claim fails because he cannot establish the second *Strickland* prong, *i.e.*, he has made no showing of prejudice.

There are many problems with Painter's assertion that the Rule of Specialty was violated in this case, all of which are pointed out by the government in its response. As an initial matter (and despite Painter's assertions to the contrary), a claim of a treaty violation, cannot be brought in a § 2255 motion where the challenge has not been brought on direct appeal. To support his claim that there is an exception to the procedural bar for treaty violations, Painter relies heavily on *Davis v. United States,* 417 U.S. 333, 344 (1974). His reliance is misplaced. First of all, *Davis* did not involve a treaty at all. Rather, the petitioner in *Davis* had unsuccessfully argued an issue on direct appeal and then sought to relitigate the issue after an intervening change in the law. 417 U.S. at 341. The Supreme Court addressed the narrow question of whether he could raise the issue in his § 2255 motion based on the intervening change in law and concluded that he could. *Id.* at 341-42.

Admittedly, *Davis* has been cited by the Fifth Circuit for the proposition that "[r]elief under § 2255 does extend to treaty violations." *See Wesson v. U.S. Penitentiary Beaumont,* 305 F.3d 343, 348 (5th Cir. 2002) (cited in Plaintiff's Reply at page 2). That statement was made in the context of the *Wesson* court's determination that § 2255 was not an inadequate or ineffective remedy such that the petitioner should be allowed to seek § 2255-type relief under 28 U.S.C. § 2241. The statement cannot be read to exempt claims of treaty violations from the general

procedural bars applicable to claims raised in § 2255 motions.

Even if it is properly brought for the first time in a § 2255 motion (or, alternatively, even if Painter could show cause and default for his failure to appeal the issue), it is uncertain whether Painter has standing to even make such a challenge. Painter's view is that a criminal defendant has standing to challenge a violation of a treaty, although he is not a party to that treaty. Even those cases which seem to support his view, however, limit the issues that the defendant can challenge. *See, e.g., United States v. Diwan,* 864 F.2d 715, 720-21 (11th Cir. 1989) (a defendant facing prosecution for offenses other than those for which extradition had been granted "can raise only those objections to the extradition process that the surrendering country might consider a breach of the extradition treaty," because the defendant's remedy is "derivative in nature").

The Fifth Circuit has not squarely addressed the issue of standing in this context. *United States v. LeBaron,* 156 F.3d 621, 627 (5th Cir. 1998) (noting fact and declining to address). Nontheless, the Fifth Circuit's decision in *United States v. Kaufman* "suggested that a criminal defendant has no standing to argue the specialty doctrine when the asylum state has failed to raise an objection to the proceeding." *United States v. Miro,* 29 F.3d 194, 200 n.5. (5th Cir. 1994) (citing *Kaufman,* 858 F.2d 994, 1009 n.5 (5th Cir. 1988), *reh'g denied,* 874 F.2d 242, 243 (5th Cir. 1989) (per curiam)). Just as the *Miro* and *LeBaron*

courts declined to address the standing issue, this Court finds it unnecessary to determine whether Painter has standing to assert a violation of the Rule of Specialty. Even if he had standing, Painter's prosecution did not violate the Rule of Specialty, as discussed below.

As an initial matter, Painter's arguments rest on the faulty premise that Costa Rica did not authorize extradition on the failure to appear indictment. In fact, however, the evidence before the Court shows that United States sought extradition on both indictments, and Painter has presented nothing to this Court to show that extradition was not granted as to both indictments.[5]

Moreover, Painter was not tried or punished on the failure to appear indictment; it was dismissed. Neither the obstruction of justice enhancement or the denial of acceptance of responsibility (resulting in an increased sentence in the drug case) violated the Rule of Specialty. *United States v. Garrido-Santana,* 360 F.3d 565, 577-79 (6th Cir. 2004) (use of non-extraditable offense of failure to appear to increase the defendant's sentence on the extraditable drug offense did not constitute "punishment" in violation of

[5] Painter relies on Exhibit B to his motion for support of his claim that Costa Rica did not extradite him on the obstruction of justice. As the government correctly notes, the document (an uncertified, unauthenticated facsimile copy) is entirely in Spanish. Painter has not provided a translation, official or otherwise, and the Court therefore does not consider the document.

the Rule of Specialty, *cert. denied,* 124 S. Ct. 2926 (2004). Although *Garrido-Santana,* as a decision of the Sixth Circuit, is obviously not binding in the instant case, the Court finds the analysis and reasoning of that decision persuasive. *See also United States v. Lazarevich,* 147 F.3d 1061, 1063 (9th Cir. 1998) (district court's consideration of a non-extraditable offense to increase sentence for offense for which defendant was extradited was not "punishment" in violation of the rule of specialty).

For the foregoing reasons, even if his counsel had argued based on the Rule of Specialty, the argument would not have changed the outcome of Painter's case, nor altered his sentence in any way. Similarly, because the argument would not have succeeded on appeal, his counsel was not ineffective for failing to appeal the issue. *See United States v. Kirnler,* 167 F.3d 889, 893 (5th Cir. 1999) ("An attorney's failure to raise a meritless argument . . . cannot form the basis of a successful ineffective assistance of counsel claim because the result of the proceeding would not have been different had the attorney raised the issue."). Accordingly, Painter cannot establish prejudice and his ineffective assistance claims fail on the record before this Court.

D. Unknowing and Involuntary Guilty Plea

For the same reasons set forth in the preceding section, Painter's claim that his plea was involuntary

fails. He alleges that he pleaded guilty because his attorney erroneously informed him that the failure to appear charge was viable and could be run consecutively to any sentence received in the outstanding drug case. (D.E. 50, at 16). He claims he therefore gained nothing by pleading guilty. Because the Rule of Specialty did not prevent his prosecution for obstruction of justice, as discussed above, his attorney did not err, and Painter cannot show prejudice. This claim fails.

E. Certificate of Appealability

An appeal may not be taken to the court of appeals from a final order in a habeas corpus proceeding "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1)(A). Although Painter has not yet filed a notice of appeal, this Court nonetheless addresses whether he would be entitled to a COA. *See Alexander v. Johnson,* 211 F.3d 895, 898 (5th Cir. 2000) (a district court may *sua sponte* rule on a COA because "the district court that denies a petitioner relief is in the best position to determine whether the petitioner has made a substantial showing of a denial of a constitutional right on the issues before that court. Further briefing and argument on the very issues the court has just ruled on would be repetitious.").

A COA "may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "The COA

determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits." *Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003). To warrant a grant of the certificate as to claims denied on their merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484 (2000). This standard requires a § 2255 movant to demonstrate that reasonable jurists could debate whether the motion should have been resolved differently, or that the issues presented deserved encouragement to proceed further. *United States v. Jones,* 287 F.3d 325, 329 (5th Cir. 2002) (relying upon *Slack,* 529 U.S. at 483-84).

As to claims that the district court rejects solely on procedural grounds, the movant must show both that "jurists of reasons would find it debatable whether the petition states a valid claim of the denial of a constitutional right ***and*** that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack,* 529 U.S. at 484 (emphasis added).

The Court concludes that reasonable jurists could not debate the denial of Painter's § 2255 motion on substantive grounds nor find that the issues presented are adequate to deserve encouragement to proceed. *Miller-El,* 123 S. Ct. at 1034 (citing *Slack,* 529 U.S. at 484, 120 S. Ct. at 1604). Similarly, as to those claims that this Court dismissed on procedural grounds, the Court finds that Painter cannot

establish either of the Slack criteria. That is, jurists of reasons would not debate whether he has stated a valid claim of the denial of a constitutional right, nor would they find this Court's procedural rulings debatable. Accordingly, Painter is not entitled to a COA as to any of his claims.

V. CONCLUSION

For the aforementioned reasons, Painter's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 (D.E. 50) is DENIED. Additionally, Painter is DENIED a Certificate of Appealability,

Signed this 5th day of November, 2004.

/s/ Janis Jack
JANIS GRAHAM JACK
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40039
USDC No. 2:04-CV-309
USDC No. 2:01-CR-190-ALL

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD S. PAINTER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Jun. 9, 2006)

ORDER:

Richard S. Painter seeks a Certificate of Appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2255 motion. Painter has demonstrated that jurists of reason would debate the correctness of the district court's rulings regarding (1) whether counsel's erroneous advice regarding the offenses for which Painter could be prosecuted following extradition rendered his guilty plea involuntary, and (2) whether the procedural default doctrine

applies to claims based on the rule of specialty or whether such claims may be raised for the first time in a § 2255 motion. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Accordingly, a COA is granted as to those issues. Painter's contention that counsel's failure to raise an objection regarding the doctrine of specialty constitutes ineffective assistance of counsel fails to meet the standard set forth in *Slack*. Therefore, a COA is denied as to that issue. In addition, the parties are directed to brief whether Painter has standing to assert claims based on the rule of specialty.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES
CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-40039

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

RICHARD S PAINTER

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas, Corpus Christi

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ON PETITION FOR REHEARING

(Filed Aug. 22, 2007)

Before HIGGINBOTHAM, WIENER and CLEMENT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.[1]

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[1] This court stated in its Opinion that the content of Richard Painter's extradition order was "unbeknownst to the

(Continued on following page)

ENTERED FOR THE COURT:

/s/ EB Clement
United States Circuit Judge

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parties at the time because the document was untranslated." Slip op. at 3. In Painter's petition for rehearing, he argues that trial counsel's lack of knowledge of the extradition order's content was not due to its language, but rather a lack of investigation. *See* Petition for Reh'g at 5-6. This court notes, however, that any error about trial counsel's fluency in Spanish and failure to investigate relates only to counsel's performance and not to prejudice, upon which this court based its ruling. *See* Slip op. at 6-7. Accordingly, Painter's argument is without merit.